Supreme Court, U. S.
FILED
MAY 7 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1684

THOMAS M. FAHEY, *Appellant,*

v.

CHARLES J. HYNES (Special Prosecutor), *Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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May 7, 1979

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In The

Supreme Court of the United States

OCTOBER TERM, 1978

No.

THOMAS M. FAHEY, *Appellant*,

v.

CHARLES J. HYNES (Special Prosecutor), *Appellee*.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Thomas M. Fahey, the appellant, appeals from the final judgment of the New York State Court of Appeals, dated February 6, 1979, upholding the constitutionality of a New York State statute, which statute authorizes warrantless seizures by the mere issuance of a non-judicial subpoena by any agency of the State having the power to issue subpoenas, and which statute was challenged by the appellant as being violative of the Fourth Amendment (search and seizure protections), the Fifth Amendment (self-incrimination and due process), and the Fourteenth Amendment (taking of property without due process), both on its face and as applied to appellant.

OPINIONS BELOW

The opinions of three New York State Courts, namely, the Court of Appeals, the Appellate Division (Fourth Department) of the Supreme Court, and the Supreme Court Special Term (Onondaga County) appear in the Appendix hereto.

The opinion of the Court of Appeals is unreported, and is included herein at page A-1 of the Appendix.

The opinion of the Appellate Division (Fourth Department) of the Supreme Court is reported at 63 AD2d 1119 (1978), and is included herein at page A-2 of the Appendix.

The opinion of the Supreme Court Special Term (Onondaga County) is unreported, and is included herein at pages A-2 and A-3 of the Appendix.

JURISDICTION

The judgment of the New York State Court of Appeals upholding the constitutionality of the challenged state statute was entered on February 6, 1979.

A notice of appeal to this Court was duly filed in the New York State Court of Appeals on April 25, 1979.

An application for extension of time to docket the appeal was filed with this Court (Associate Justice Marshall) on April 27, 1979, more than 10 days before the due date for the docketing, and was denied on April 30, 1979.

This appeal is being docketed in this Court within 90 days from the entry of the judgement in the New York State Court of Appeals. The jurisdiction of this Court is involved under 28 U.S.C. § 1257 (2).

QUESTIONS PRESENTED

Fourth Amendment question:

Does a State statute that authorizes warrantless seizures by the mere issuance of a non-judicial subpoena by any State agency authorized to issue subpoenas violate, on its face, the Fourth Amendment prohibitions against warrantless searches and seizures on the grounds that:

(1) the statute does not require the State agency to obtain either a "search" warrant (for a criminal purpose) or an "inspection" warrant (for a civil purpose) upon the refusal of a subpoenaed party to permit a warrantless seizure of his property (including his books and papers), and,

(2) the statute does not in any respect qualify as one of the "exceptions" to the prohibition against warrantless seizures.

Fifth Amendment question:

The Fourth Amendment question aside, does a State statute that authorizes warrantless seizures by any State agency authorized to issue subpoenas violate, on its face, the self-incrimination and due process protections of the Fifth Amendment on the grounds that the statute requires compulsive authentication and surrender of all subpoenaed documents and fails to provide a subpoenaed party who is an individual or a sole proprietor the opportunity to assert, if he wishes, under due process testimonial conditions, his Fifth Amendment privilege (regarding testimony, property, or books and records), and which compulsion is compounded by a companion statute that makes it a crime (misdemeanor) for a subpoenaed party to refuse to testify or to surrender possession of subpoenaed books and records.

Fourteenth Amendment question:

The Fourth and Fifth Amendment questions aside, does a State statute that authorizes warrantless seizures by any State agency authorized to issue subpoenas violate, on its face, the Fourteenth Amendment protection against the taking of property without due process, on the ground that the statute does not require the State, prior to the taking of property, to satisfy all the fundamentals of due process (notice, evidentiary hearing, and judicial sanction).

STATUTE CHALLENGED AS UNCONSTITUTIONAL

New York State Civil Practice Law and Rules (CPCR), Section 2305 (c), as amended, effective July 19, 1977

§ 2305. Attendance required pursuant to subpoena; possession of books, records, documents or papers...

(c) Inspection, examination and audit of records. Whenever by statute any department or agency of government, or officer thereof, is authorized to issue a subpoena requiring the production of books, records, documents or papers, the issuing party shall have the right to the possession of such material for a period of time, and on terms and conditions, as may reasonably be required for the inspection, examination or audit of the material. The reasonableness of such possession, time, terms, and conditions shall be determined with consideration for, among other things, (i) the good cause shown by the issuing party, (ii) the rights and needs of the person subpoenaed, and (iii) the feasibility and appropriateness of making copies of the material. The cost of reproduction and transportation incident thereto shall be borne by the person or party issuing the subpoena unless the court determines otherwise in the interest of justice.

RELEVANT COMPANION STATUTE

New York State Executive Law, § 63 (8), as amended, effective July 19, 1977:

8. ... The attorney-general, his deputy, or other officer, designated by him, is empowered to subpoena witnesses, compel their attendance, examine them under oath before himself or a magistrate and require that any books, records, documents or papers relevant or material to the inquiry be turned over to him for inspection, examination or audit, pursuant to the civil practice law and rules. If a person subpoenaed to attend upon such inquiry fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or paper, when ordered to do so by the officer conducting such inquiry, he shall be guilty of a misdemeanor...

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment, United States Consitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment, United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...; nor shall any person...be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;...

Fourteenth Amendment, United States Constitution:

Section 1. ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Proceedings in the lower courts and how the Federal questions were raised

The appellant Thomas M. Fahey is a sole proprietor who owns a private (proprietary) nursing home licensed under the laws of the State of New York (the Castle Rest Nursing Home). The appellant has been the sole owner of the nursing home since October 19, 1972, and also serves as the administrator of the nursing home.

The appellee Charles J. Hynes is a Special Prosecutor appointed by the Governor of the State of New York on January 10, 1975 to conduct criminal investigations in the nursing home industry, for which purpose regional offices were set up by the appellee throughout the State of New York, including one in Syracuse, New York, where appellant's nursing home is located.

On January 23, 1978 the appellant was served with a non-judicial subpoena dated January 23, 1978 from the Syracuse office of the appellee. The subpoena commanded the appellant to appear at the Syracuse office of the appellee on January 30, 1978 and also commanded him to bring with him ... "the books and records of Castle Rest Nursing Home enumerated on the attached rider, pertaining to the years 1971 through 1975 inclusive."

The attached rider listed the following schedule of documents pertaining to the years 1971 through 1975 inclusive:

"Schedule of Subpoenaed Documents

1. General ledger.
2. Cash receipts journal, disbursement journal and register.
3. Purchase journal and supporting vouchers.
4. All invoices for goods and services ordered plus receiving reports or similar evidence of actual receipt.
5. Petty cash book, petty cash vouchers and summary.
6. General journal, year end adjusting entries.
7. Subsidiary records for loans payable and receivable and related documents, such as notes, loan agreements and mortgages.
8. Accounts payable subsidiary ledger.
9. Accounts receivable subsidiary ledger.
10. All bank statements, bank reconciliations, cancelled checks, check stubs and voucher copies.
11. All lease and rental agreements.
12. All accounting work papers and schedules.

13. All asset account journals and depreciation schedules.
14. Personnel files for all employees.
15. Patient daily census records.
16. All forms HE-2P submitted to the New York State Health Department."

The following observations regarding the preceeding listing are worthy of note:

(a) The listing literally comprises all of the business records, books, and working papers of the sole proprietorship.

(b) The listing also requires the surrender of both financial and personal information about every employee (Item 10), every patient (Items 2, 9, and 15), every vendor (Items 2, 3, 4, 8, and 11), and all other financial relationships (Items 1, 2, 5, and 7 thru 13).

(c) The only document listed that is "required" by the State is Item 16 (form HE-2P), which is a very detailed statistical and financial report filed annually with the State.

Appellant chose not to appear or to surrender possession of his books and records, and chose instead to move to quash the subpoena at Special Term of the Supreme Court of the State

of New York (Onondaga County).

Proceedings at Special Terms

On January 27, 1978, appellant obtained an Order to Show Cause at a Special Term of the Supreme Court, returnable on January 31, 1978, with a stay in the enforcement of the subpoena pending the return.

On January 31, 1978, appellant was served answering papers by the appellee in which the authority for issuing the subpoena was cited as being "... issued pursuant to Executive Law §63 (8) and CPLR § 2305 as amended by Chapter 451 of 1977 Session Laws."

On the same day, oral argument was had at Special Term, which was transcribed and is part of the record.

As a matter of information, but not directly relevant to the issues presented herein, the appellant did complain to the Court at this hearing that the appellee had already had complete access to the subpoenaed documents during a prior inspection on the premises to which the appellant had consented voluntarily in 1975, which the appellee admitted but justified to the Court on the grounds of now having improved techniques and procedures, which the appellant characterized as harrassment.

The appellant made a request of the Court for the opportunity to either have an evidentiary hearing or in the alternative to be permitted to file reply papers to the answer that had just been received that morning outside the courtroom. The Court denied both requests.

The Court was of the opinion that it did not have the authority to hold up an "administrative" subpoena.

Appellant then raised constitutional issues (relating to the Fourth and Fifth Amendments) and sought to obtain a stay on the enforcement of the subpoena, pending appeal by the appellant directly to the State Court of Appeals on the constitutional grounds above, and requested the opportunity to file a letter-memorandum of law, which the Court granted, provided the memorandum was submitted in a few days.

The appellant complied by submitting a letter-memorandum on February 3, 1978, and the Court, having also received a letter-memorandum from the appellee, issued a letter-opinion on February 14, 1978 in which he ruled against the appellant's constitutional contentions; and also denied the appellant's motion for a stay.

On the same day (February 14, 1978) the Court also issued an order denying appellant's motion to quash the subpoena, and ordering the

appellant to deliver the material listed in the subpoena to the appellee on or before February 23, 1978 (9 days later). This order was not filed and served on the appellant until the Court ordered the appellee to do so three days later on a Friday afternoon (February 17, 1978) so that appellant would not be obstructed in seeking a stay directly from the Court of Appeals.

Proceedings on direct appeal to the Court of Appeals

The next Tuesday (February 21, 1978), after a holiday weekend, appellant's counsel telephoned the Clerk of the Court of Appeals, and was subsequently contacted by Judge Jones of the Court of Appeals, who volunteered to come to Syracuse from Utica, New York the following day to hear full argument on whether to grant a stay on the last day before the documents were required to be delivered.

On Wednesday afternoon (February 22, 1978), Judge Jones heard argument in Syracuse for a full hour during which the appellant vigorously pressed his constitutional arguments.

During the hearing, Judge Jones asked the appellant if he would consent to placing the subpoenaed documents in the custody of the County Court Clerk pending the outcome of the appellant's direct appeal to the Court of Appeals.

Appellant agreed, whereupon Judge Jones signed an Order to Show Cause with a temporary stay, provided the documents were deposited with the Clerk on or before February 28, 1978, which was, in fact done.

On March 23, 1978, after a motion to dismiss the appeal, and after an exchange of affidavits in which the appellant sought to restrict the appeal exclusively to the constitutional issues (and the appellee sought to introduce additional issues), the Court of Appeals transferred the case to the Appellate Division (Fourth Department) to hear any additional issues that might be raised. The application for a stay pending a hearing by the Court of Appeals was dismissed as "academic" since the matter was being transferred to the Appellate Division.

Proceedings at the Appellate Division

Appellant thereupon requested and was granted (on March 31, 1978) a temporary stay with an Order to Show Cause from Associate Justice Hancock of the Appellate Division, pending a determination by the entire Court regarding the granting of a new stay.

The matter of the new stay was fully argued on papers from both parties, and on April 14, 1978 the Appellate Division entered an order granting the appellant a new stay.

In the arguments relating to the granting of the new stay, the appellant voluntarily offered the same consent that had been given to Judge Jones of the Court of Appeals, namely, agreement to allow the subpoenaed documents to remain in the custody of the Onondaga County Court Clerk.

The subpoenaed documents are still in the custody of the Onondaga County Court Clerk since no further stay was necessary, and appellant will of course not remove the documents until the final disposition of the case in this Court.

After the granting of the stay by the Appellate Division, the arguments on the merits were confined exclusively to the consitutional questions raised by the appellant. The constitutional questions that were raised in the Appellate Division are the same questions that are being raised now in this Court, namely, that the challenged statute violates the Fourth Amendment (search and seizure protections), the Fifth Amendment (self-incrimination and due process), and the Fourteenth Amendment (taking of property without satisfying the basic due process requirements (notice, evidentiary hearing, and judicial sanction) prior to the seizure of property.

After oral argument (May 23, 1978) it was learned on the same day from the evening news-

papers that the United States Supreme Court had handed down its decision in the highly significant Fourth Amendment case of Marshall v. Barlow's, Inc., ___ U.S.____, 46 L.W. 4483 (No. 76 - 1143) (decided May 23, 1978).

After receiving the Barlow decision a few days later from Law Week, appellant promptly prepared and submitted to the Appellate Division (on June 1, 1978) a letter-memorandum vigorously putting forth the argument that the Barlow case should be dispositive of the instant case in appellant's favor on Fourth Amendment grounds alone, and that the Barlow case also supported appellant's Fifth Amendment contentions.

Appellant put forth several Barlow case arguments (which are summarized later) but the essence of the appellant's position was that the Barlow decision created an a fortiori situation with respect to the challenged New York statute. Since the New York statute goes much further than the Federal statute that was struck down by the Supreme Court, it follows, a fortiori, that the New York statute must also fall to the same extent that the Federal statute fell.

Appellant also argued, conversely, that if the Congress of the United States ever passed a "seizure" statute as sweeping as the New York "seizure" statute, it would probably be struck

down by a unanimous Supreme Court because even the minority position in the Barlow case, appellate contended, could not support a statute that did not even attempt to qualify as one of the "exceptions" to the Fourth Amendment prohibitions, since the "law" of the Fourth Amendment is promulgated by this Court appears very clearly to be a law of "exceptions".

Appellant also argued, on an even more fundamental basis, that the Barlow case also stood for the proposition that the ultimate decision in any particular question of whether or not to enlarge the "exceptions" to the prohibitions of the Fourth Amendment must be not with the Congress but with the Supreme Court.

(Appellant respectfully submits that if this were not the case, it is easily foreseeable that State Legislatures, and even the Congress itself, could run rampant in days of popular excitement and utterly destroy the entire fabric of Fourth Amendment protections.)

On June 2, 1978, the day after the appellant submitted his special memorandum on the Barlow case, the Appellate Division entered an order adverse to the appellant, affirming the order appealed from without costs. (The appellant has not way of knowing whether the decision of the Appellate Division was made prior to the receipt

of his special memorandum).

Proceedings at the Court of Appeals

The appellant filed a notice of appeal to the New York State Court of Appeals on June 23, 1978. Appellant appealed as of right relying solely on the constitutional questions involving the Fourth, Fifth, and Fourteenth Amendments.

In the subsequent filing of the appellant's jurisdictional statement to the Court of Appeals (on July 3, 1978), appellant included as a part of the jurisdictional statement not only the required lower court orders and opinions, but also the appellant's main brief, reply brief, and special memorandum in the Barlow case that had already been submitted to the Appellate Division.

This was done in order to ensure that the Court of Appeals would have on hand at the outset, as part of the record, all of the appellant's constitutional arguments so there would be no question as to what was being passed on by the Court of Appeals in the event of an adverse decision by the Court.

Three days after the filing of appellant's jurisdictional statement, appellant was invited by a letter from the Clerk of the Court of Appeals (dated July 6, 1978) to exercise an option to submit within 10 days additional comments

justifying the retention of subject matter jurisdiction. The letter offered the same opportunity to the appellee.

The letter was followed by an exchange of submittals by both parties. On July 17, 1978 appellant filed a response to the first letter, on July 20, 1978 the appellee filed an "answer", and on July 28, 1978 appellant filed a "reply" thereto.

The papers filed by both parties in this exchange dealt exclusively with the constitutional issues raised by the appellant; and included opposing contentions regarding not only the applicability of the Barlow case to the instant case, but also regarding all other constitutional issues.

On September 7, 1978 the Clerk of the Court of Appeals addressed a letter to both parties thanking them for their responses, stating that the appeal would continue in its normal course and the Court would not act sua sponte; that the letter did not represent an adjudication of the subject matter jurisdiction, and that the letter was without prejudice to any motion any party may wish to make or to a future consideration of the question by the Court.

The appellee filed a motion to dismiss the appeal (on December 21, 1978), to which the

appellant responded by a letter-memorandum (on January 8, 1979). Only the constitutional issues were argued in the submittals from both parties.

The Court of Appeals dismissed the appeal (on February 6, 1079) on the ground "... that no substantial constitutional question is directly involved."

THE QUESTIONS ARE SUBSTANTIAL

Special note regarding the ruling of the Court of Appeals

Appellant believes that the instant case represents the first case in which the New York State Court of Appeals has ruled on the applicability of the Barlow case to the statute being challenged by appellant as unconstitutional.

Appellant respectfully submits that the applicability of the Barlow case to a State "seizure" statute is of such great importance that it warrants a full briefing, analysis, and argument on this ground alone.

Overview of the substantiality of the questions

That the questions presented are substantial enough to warrant full argument is to some extent

evident from the preceeding outline of the proceedings in the lower state courts wherein both the Court of Appeals and the Appellate Division granted the appellant the stays he requested after full argument on papers.

Appellant is convinced, having deeply researched the law involved, that given the opportunity to bring up the record and to present to this Court a full briefing on the law involved that he can convince the Court that the New York statute is indeed clearly unconstitutional.

The issues here are deep and broad and to the extend that there appears to be an interrelationship between Fourth Amendment and Fifth Amendment questions, appellant submits that in this case the lines can be clearly and discreetly drawn to isolate the Fourth and Fifth Amendment questions so they can stand entirely on their own.

Given appellant's challenges on three broad constitutional fronts (the Fourth, Fifth, and Fourteenth Amendments), appellant respectfully submits that he requires the vehicle of the brief to adequately present to this Court the authoritative support for his basic contentions in all three areas.

Appellant submits unequivocally that with respect to all the cases cited by the Appellate

Division he will be able to demonstrate that all of these cases totally support the position of the appellant and do not support the position of the appellee, with respect to both the Fourth Amendment and Fifth Amendment questions.

And with respect to all of these cases it should also be pointed out that they were all decided before Barlow.

Appellant will rely heavily on Barlow to demonstrate that the challenged New York statute, to be constitutional, must contain a provision that requires the State to obtain an "inspection" warrant in the event it wishes to examine books and records if the party subpoenaed refuses to permit the examination.

Appellant is also prepared to demonstrate, from the cases decided by this Court, that if the State wishes to "examine" the books and records for a civil purpose it must obtain an "inspection" warrant, and when the State wishes to "examine" for a criminal purpose, it must obtain a "search" warrant.

Appellant is also anticipating, and is fully prepared to refute, a thrust by the appellee that there is a "required records" doctrine that sanctions the challenged statute. We submit that this theory is made out of whole cloth and will not stand up to the case law, neither on Fourth

Amendment grounds nor on Fifth Amendment grounds.

Appellant is also prepared to demonstrate fully that the kind of Fifth Amendment problem that arises in a State regarding compulsory authentication and surrender of possession of documents does not arise under Federal agencies because of the following reasons:

(1) There is an "automatic" immunity statute that applies to the proceedings of almost all Federal agencies.

(2) There is generally no penalty for refusal to respond to a subpoena.

(3) The burden is on the government to indicate action to enforce a subpoena in a Federal Court where the subpoenaed party has an opportunity to obtain an evidentiary hearing prior to any judicial sanction.

In a State that does not have this kind of regulatory scheme that exists in the Federal establishment, a party subpoenaed under State law requires the protections of the Fourth, the Fifth, and the Fourteenth Amendments.

This kind of protection is needed in the State of New York. Appellant seeks the opportunity to make this abundantly clear with full argument on the issues presented to this Court.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

DANTE M. SCACCIA

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(315) 422-4000

Counsel for Appellant

April 7, 1979

APPENDIX

OPINION OF COURT OF APPEALS OF THE STATE OF NEW YORK, dated February 6, 1979.

4 Mo. No. 17

In the Matter of the Application of Thomas M. Fahey, d.b.a. Castle Rest Nursing Home, *Appellant,*

vs.

Charles J. Hynes, Deputy Attorney General of the State of New York (Special Prosecutor), *Respondent.*

For an Order &c.

Motion to dismiss the appeal herein granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that no substantial constitutional question is directly involved.

DECISION COURT OF APPEALS FEB 6 1979

OPINION OF THE APPELLATE DIVISION (FOURTH DEPARTMENT) OF THE SUPREME COURT OF THE STATE OF NEW YORK, dated June, 1978.

MEMORANDUM, Fourth Dept., June, 1978 1119

5 In the Matter of THOMAS M. FAHEY, Doing Business as CASTLE REST NURSING HOME, Appellant, v CHARLES J. HYNES, as Deputy Attorney-General of the State of New York, Respondent.—Order unanimously affirmed, without costs. (*Matter of Hynes v Moskowitz*, 44 NY2d 383; see, also, *Shapiro v United States*, 335 US 1, 32-35, reh den 335 US 836; *Matter of Cappetta*, 42 NY2d 1066, 1067; *Matter of Sigety v Hynes sub nom. Kent Nursing Home v Office of Special State Prosecutor*, 38 NY2d 260, 268, cert den 425 US 974.) (Appeal from order of Onondaga Supreme Court—quash subpoena.) Present—Cardamone, J.P., Simons, Hancock, Jr., Denman and Schnepp, JJ.

OPINION OF THE SUPREME COURT, SPECIAL TERM (ONONDAGA COUNTY), OF THE STATE OF NEW YORK, dated February 14, 1978.

FEB 15 1978

State of New York
Supreme Court Chambers
Herkimer, N.Y. 13350

[SEAL]

James P. O'Donnell
Justice

February 14, 1978

Special Prosecutor for Nursing Homes Health and Social Services
109 South Warren Street
Syracuse, New York 13202

Att: Paula M. Ryan, Special Asst. Attorney General

Re: Fahey v. Hynes

Dear Miss Ryan:

This Court clearly feels that this subpoena duces tecum issued under Section 63, subdivision 8 of the Executive Law was clearly within the authority of the Special Prosecutor to issue. The Court, in Matter of Sigety v. Hynes, clearly stated that a nursing home industry, care of elderly and infirm and the compensation for the care of such people from public treasurer are matter of concern for the public peace, public safety and public justice. Matter of Sigety v. Hynes 38 N. Y. 2d 260 It does not appear in this record to show that the Special Prosecutor's Office is using harassing tactics to be so overbroad in its investigation to constitute harassment under

OPINION OF THE SUPREME COURT, SPECIAL TERM (ONONDAGA COUNTY), OF THE STATE OF NEW YORK, dated February 14, 1978.

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Special Prosecutor for Nursing Homes, etc.
Re: Fahey v. Hynes

the holding in Myerson v. Lentini Moving and Storage 33 N. Y. 2d 250. The Court in the Friedman v. Hi-Li Manor case held that the power and enforcement of these subpoenas were not a violation of constitutional protection against compulsory self incrimination. Friedman v. Hi-Li Manor 42 N. Y. 2d 408. Bellis v. United States 417 U. S. 85.

Under the circumstances, I am signing this Order dismissing the Petition of Thomas Fahey and directing the Petitioner to comply with this subpoena by delivering the materiais innumerated therein to the Respondents on or before February 23, 1978.

The Petitioner's motion for a Stay be and hereby is denied.

Very truly yours,

JAMES P. O'DONNELL
Justice of the Supreme Court

JRO/gal
Encs.
cc: Love, Balducci and Scaccia
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Att: Dante Scaccia, Esq.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES, dated April 25, 1979.

IN THE COURT OF APPEALS OF THE
STATE OF NEW YORK

THOMAS M. FAHEY, Appellant,

v. NO. 78-585

CHARLES J. HYNES, Appellee

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Thomas M. Fahey, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, dismissing the appeal, entered in this action on February 6, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

s/ DANTE M. SCACCIA

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April 25, 1979

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1684

THOMAS M. FAHEY,

Appellant,

against

CHARLES J. HYNES *(Special Prosecutor)*

Appellee.

On appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS THE APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE DECISION OF THE COURT OF APPEALS

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1684

THOMAS M. FAHEY,

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Appellee.

On appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE DECISION OF THE COURT OF APPEALS

Appellee Charles J. Hynes, Deputy Attorney General of the State of New York and Special State Prosecutor for Nursing Homes, Health and Social Services hereby moves that the Court dismiss this appeal from an order of the Court of Appeals of the State of New York upon the ground that the issues presented are moot and upon the additional ground that the issues are so unsubstantial as not to warrant further argument.

Statement of the Case

The Attorney General of the State of New York and his deputies must, when ordered to do so by the Governor, "inquire into matters concerning the public peace, public safety and public justice." McKinney's Consolidated Laws of New York, Executive Law §63(8). Within the last several years allegations that persons employed in the nursing home industry were defrauding New York State's Medicaid reimbursement program became matters of grave concern to the people of New York. Therefore, on February 7, 1975, Governor Hugh L. Carey issued Executive Order No. 4 by which he directed the Attorney General to

> inquire into matters concerning the public peace, public safety and public justice with respect to possible criminal violations in connection with or in any way related to the management, control, operation or funding of any nursing home, care center, health facility or related entity located in the State of New York, or any principal, agent, supplier or other person involved therewith, and I so direct you to do so in person or by your assistant or deputies and to have the powers and duties specified in such subdivision 8 [of Section 63 of the Executive Law] for the purpose of this requirement.

9 New York Codes, Rules, and Regulations (N.Y.C.R.R.) §3.4.

The Attorney General assigned Deputy Attorney General Charles J. Hynes, the appellee, to conduct the inquiries mandated by Governor Carey's order. On January 23,

1978, Deputy Attorney General Hynes issued a subpoena duces tecum, by authority of Section 63(8) of the Executive Law, to appellant Thomas M. Fahey. Fahey is licensed by New York State to operate the Castle Rest Nursing Home, a skilled nursing facility located in Syracuse, New York. The subpoena commanded Fahey to bring the nursing home's financial books and records for the years 1971 through 1975 to the office of the Deputy Attorney General on January 30, 1978. Fahey's nursing home was required to maintain the subpoenaed records by both federal and state regulations. *See, e.g.*, 42 C.F.R. §405.453(a), (c); 10 N.Y.C.R.R. §§86-2.3, 86-2.7.

Fahey moved to quash the subpoena in New York Supreme Court, contending that the Deputy Attorney General had issued it merely to harass him. An assistant to the Deputy Attorney General replied that the subpoena was issued simply to enable the Deputy Attorney General's office to complete an audit of the Castle Rest Nursing Home. This audit had been commenced, but not properly concluded, shortly after the nursing home investigation began in 1975.

On February 14, 1978 the New York Supreme Court rejected Fahey's contention that the Deputy Attorney General had issued the subpoena for an improper purpose, and denied the motion to quash. Fahey then attempted to take a direct appeal to New York's highest court, the Court of Appeals, on constitutional grounds. He argued that Section 63(8) of the Executive Law and Section 2305(c) of the New York Civil Practice Law and Rules (C.P.L.R.) violated the Fourth, Fifth and Fourteenth Amendments of the Constitution. The enactments, read together, grant the

Attorney General and his Deputies authority to retain subpoenaed records for a reasonable time and under terms and conditions set by the courts. See page 7, *infra*. The Deputy Attorney General moved to dismiss the direct appeal, noting that Fahey had not challenged the statutes as unconstitutional during the proceedings before the Supreme Court. On March 23, 1978 the Court of Appeals ordered Fahey's appeal transferred to the Appellate Division of Supreme Court.

In the Appellate Division, Fahey pursued his new arguments concerning the purported unconstitutionality of Section 63(8) of the Executive Law and Section 2305(c) of the C.P.L.R. He abandoned his contention that the subpoena had been designed to harass him. Deputy Attorney General Hynes again noted that Fahey had not properly raised the constitutional issues in the Supreme Court. Nevertheless, he argued that even if Fahey had raised the issues, the statutes were constitutionally sound. Shortly after both sides had filed their briefs with the Appellate Division, the Court of Appeals handed down its opinion in *Matter of Hynes* v. *Moskowitz,* 44 N.Y.2d 383, 377 N.E.2d 446 (1978), in which it upheld both statutes as constitutional. Thereafter, in an order entered on June 2, 1978, the Appellate Division, citing *Moskowitz,* unanimously affirmed the Supreme Court's denial of Fahey's motion to quash the subpoena. *Matter of Fahey* v. *Hynes,* 63 A.D.2d 1119, 406 N.Y.S.2d 712 (4th Dept. 1978).

On June 23, 1978, Fahey docketed in the New York Court of Appeals an appeal as of right on constitutional grounds. *See,* C.P.L.R. §5601(b)(1). Fahey asked the Court of Appeals to entertain the appeal because, in his

view, Section 63(8) of the Executive Law and Section 2305(c) of the Civil Practice Law and Rules authorized warrantless searches and seizures in violation of the Fourth Amendment. Citing the United States Supreme Court's decision in *Marshall* v. *Barlow's Inc.,* —— U.S. ——, 98 S.Ct. 1816 (1978), Fahey asserted that an unconstitutional search occurs whenever a state agency is permitted by statute to retain temporarily materials which a party produces before it in compliance with a subpoena duces tecum. In another vein, Fahey argued that the statutes impermissibly abridged his Fifth Amendment privilege against self-incrimination, because he is the sole owner of the nursing home whose records were sought by the subpoena.

On October 30, 1978, four months after Fahey filed his notice of appeal to the Court of Appeals, the Supreme Court of the United States dismissed for want of a substantial federal question an appeal taken from the New York Court of Appeals' decision in the *Moskowitz* case, *supra. Moskowitz* v. *Hynes,* —— U.S. ——, 99 S.Ct. 302 (1978). The appellant in *Moskowitz,* citing *Marshall* v. *Barlow's Inc., supra,* had argued in his jurisdictional statement to the Supreme Court that the very statutes challenged by Fahey violated the Fourth and Fourteenth Amendments because they purportedly authorized warrantless searches.

After the Supreme Court of the United States dismissed the *Moskowitz* appeal for want of a substantial federal question, the Deputy Attorney General moved in the New York Court of Appeals for a dismissal of Fahey's appeal upon the same ground. The Deputy Attorney General

cited this Court's dismissal of the *Moskowitz* appeal to show that Fahey's Fourth and Fourteenth Amendment claims were meritless. To refute Fahey's Fifth Amendment claim, the Deputy Attorney General pointed out that the Castle Rest Nursing Home had voluntarily chosen to participate in the Medicaid and Medicare programs so that it could be reimbursed for caring for elderly and indigent patients. The Deputy Attorney General argued that because state and federal regulations require the nursing home to maintain the subpoenaed records for government inspection as a condition for its continued participation in these programs, Fahey lacked a viable Fifth Amendment claim in these records.

On February 6, 1979, the New York Court of Appeals granted the Deputy Attorney General's motion, and ordered that Fahey's appeal be dismissed "upon the ground that no substantial constitutional question is directly involved." Appellant's Appendix, at A 1. This is the order from which Fahey appeals to this Court.

After the Court of Appeals entered its order dismissing Fahey's appeal, the clerk of the New York Supreme Court, with whom Fahey had deposited the subpoenaed records during the pendency of the state court litigation, transferred custody of the subpoenaed records to the office of the Deputy Attorney General.

Statutes Involved

Section 2305(c) of the CPLR, which was added by Chapter 451 of the Laws of 1977, provides:

(c) Inspection, examination and audit of records. Whenever by statute any department or agency of government, or officer thereof, is authorized to issue a subpoena requiring the production of books, records, documents or papers, the issuing party shall have the right to the possession of such material for a period of time, and on terms and conditions, as may reasonably be required for the inspection, examination or audit of the material. The reasonableness of such possession, time, terms, and conditions shall be determined with consideration for, among other things, (i) the good cause shown by the issuing party, (ii) the rights and needs of the person subpoenaed, and (iii) the feasability and appropriateness of making copies of the material. The cost of reproduction and transportation incident thereto shall be borne by the person or party issuing the subpoena unless the court determines otherwise in the interest of justice.

Chapter 451 of the Laws of 1977 also amended Section 63(8) of the Executive Law by adding the material in italics indicated below.

The attorney-general, his deputy, or other officer, designated by him, is empowered to subpoena witnesses, compel their attendance, examine them under oath before himself or a magistrate and require *that* any books, *records, documents* or papers relevant or material to the inquiry *be turned over to him for inspection, examination or audit, pursuant to the civil practice law and rules.*

POINT I

The subpoena duces tecum which the appellant challenges on this appeal has been satisfied. Therefore, the appeal should be dismissed as moot.

The appellant challenged the lawfulness of a subpoena duces tecum issued by the Deputy Attorney General on the ground that, under state law, this subpoena would permit the Deputy Attorney General to obtain possession of the subpoenaed material for a reasonable period of time for the purpose of his inquiry into the administration, management, control, operation, supervision, funding and quality of nursing homes located in New York State. C.P.L.R. 2305(c). He claimed that this right to possess the subpoenaed materials, without a showing of probable cause, violated the Fourth, Fifth, and Fourteenth Amendments. The New York Court of Appeals disagreed, dismissing his appeal from an order of the Appellate Division which upheld the subpoena as valid. Thereafter, the Deputy Attorney General obtained the subpoenaed books and records from the clerk of the New York Supreme Court, who had been holding them pending the litigation in state court.

On this appeal, the appellant seeks to reverse the Court of Appeals' decision that his challenges to the subpoena are unsubstantial. Since the subpoena has already been satisfied, this relief would not restore him to the *status quo ante*. Therefore, the appellant's appeal should be dismissed as moot. *Cf. Defunis* v. *Odegaard,* 416 U.S. 312 (1974).

POINT II

The arguments made by the appellant in his appeal do not present a substantial federal question. Therefore, his appeal should be dismissed or, in the alternative, the order of the Court of Appeals should be affirmed.

The appellant claims that Section 63(8) of the New York Executive Law and Section 2305(c) of the New York Civil Practice Law and Rules authorize warrantless searches and seizures in violation of the Fourth Amendment. In *Moskowitz* v. *Hynes,* —— U.S. ——, 99 S.Ct. 302 (1978), this Court dismissed for want of a substantial federal question the very same argument directed against these very same statutes. The appellant fails to show how this argument has in some way become substantial during the brief interval between the dismissal of the *Moskowitz* appeal and the docketing of his own.

Fahey also claims on this appeal that the statutes violate the due process clause of the Fourteenth Amendment because they purportedly authorize agencies of New York State to take property without requiring "the State, prior to the taking of property, to satisfy all the fundamentals of due process (notice, evidentiary hearing, and judicial sanction)." Appellant's Jurisdictional Statement, at 4. This argument is unworthy of review by this Court. The New York Court of Appeals in its opinion in *Matter of Hynes* v. *Moskowitz,* 44 N.Y.2d 383, 377 N.E.2d 446 (1978), said that under New York law a subpoena itself must give adequate notice of when and where a witness is to produce subpoenaed records. Moreover, according to the Court of

Appeals, "a person served with a non-judicial subpoena duces tecum may challenge it in court if the subpoena requires the production of irrelevant or immaterial documents (*Carlisle* v. *Bennett,* 268 N.Y. 212 [197 N.E.2d 220 (1935)], or is used as an instrument of harassment (*Matter of A'Hearn* v. *Committee on Unlawful Practice of Law of N.Y. County Lawyers' Assn.,* 23 N.Y.2d 916 [246 N.E.2d 166 (1969)], cert. den. 395 U.S. 959." *Matter of Hynes* v. *Moskowitz,* 44 N.Y.2d at 393. The Court of Appeals in *Moskowitz* also said that, under Section 63(8) of the Executive Law and Section 2305(c) of the C.P.L.R. a subpoenaed party has a right to petition the New York courts should he wish limits to be imposed upon the terms, and conditions under which the issuer of the subpoena may temporarily retain the subpoenaed materials. *Id.* at 392-393. Thus, the appellant clearly errs in contending that the statutes do not afford due process to subpoenaed parties.

Appellant's proposed Fifth Amendment challenge to the statutes is also unsubstantial. The statutes simply do not abridge the right against self-incrimination. Should a subpoenaed party have a viable Fifth Amendment interest in any of the records sought pursuant to a subpoena, he may move under New York law to quash the subpoena on that ground. *See, Matter of Sigety* v. *Hynes,* 38 N.Y.2d 260, 342 N.E.2d 518, cert. denied 425 U.S. 974 (1975). In any event, appellant clearly does not have such an interest in the records sought by means of the present subpoena. These records are the financial records of a nursing home. Nursing homes in New York State must be licensed by state agencies and must submit to close supervision by these agencies. *See, Matter of Sigety* v. *Hynes, supra,* 38 N.Y.2d, at 268 (1975). Furthermore, nursing home operators are required by government regulations to maintain financial records for inspection by the state and federal agencies as a condition both for its license to operate and for its continued participation in the Medicaid and Medicare programs. *See, e.g.,* 42 C.F.R. §405.453(a), (c); 10 N.Y.C.R.R. §§86-2.3, 86-2.7. *See, Matter of Sigety* v. *Hynes, supra,* 38 N.Y.2d at 368. Fahey affirmatively decided to operate a nursing home which is regulated by the state. Moreover, he freely decided to participate in the state's reimbursement program. Therefore, under the "required records" doctrine which this Court recognized in *Shapiro* v. *United States,* 335 U.S. 1, 17-19 (1948), Fahey lacks a viable Fifth Amendment interest in the subpoenaed records.

Conclusion

The Appellant's appeal should be dismissed. In the alternative, the order of the Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUN 5 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1684

THOMAS M. FAHEY, *Appellant,*

v.

CHARLES J. HYNES (Special Prosecutor), *Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS

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June 4, 1979

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In The

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OCTOBER TERM, 1978

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THOMAS M. FAHEY, *Appellant,*

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CHARLES J. HYNES (Special Prosecutor), *Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS

CRITICAL ADDITION TO THE STATEMENT OF THE CASE

Appellant was shocked and outraged when he discovered after receiving the appellee's motion to dismiss (on May 26, 1979) that the appellee had improperly obtained possession of the subpoenaed papers from the Onondaga County Court Clerk in order to manufacture what appellee considers is a "mootness" question.

The basic facts of the matter, together with a refutation of appellee's mootness argument are presented together under POINT IV of this document.

POINT I

REPLY TO THE RESPONSE OF APPELLEE TO THE FOURTH AMENDMENT QUESTION

In his jurisdictional statement (page 3), the appellant raised the following Fourth Amendment question:

> Fourth Amendment question:
>
> Does a State statute that authorizes warrantless seizures by the mere issuance of a non-judicial subpoena by any State agency authorized to issue subpoenas violate, on its face, the Fourth Amendment prohibitions against warrantless searches and seizures on the grounds that:
>
> (1) the statute does not require the State agency to obtain either a "search" warrant (for a criminal purpose) or an "inspection" warrant (for a civil purpose) upon the refusal of a subpoenaed party to permit a warrantless seizure of his property (including his books and papers), and
>
> (2) the statute does not in any way qualify as one of the "exceptions" to the prohibitions against warrantless seizures.

In his jurisdictional statement the appellant discussed in some detail the merits of the Barlow case, Marshall v. Barlow's Inc., 436 U.S. 307 (1978), as it applied to the challenged New York statute, and in this connection also pointed out (on page 20) that he believed the instant case represents the first case before this Court in which the New York State Court of Appeals has ruled on the applicability of the Barlow case to the statute being challenged by the appellant.

In his motion to dismiss, the appellee has totally avoided any discussion whatsoever on the merits of the applicability of the Barlow case (see page 9, POINT II).

Instead of responding to the Barlow challenge on the merits, the appellee has made, we submit, a fundamental error in law by seeking to rely on the totally inapplicable case of Moskowitz v. Hynes, ____U.S.____, 99 S.Ct. 302 (1978), (an appeal from the New York State Court of Appeals dismissed by this Court).

The appellee fails to point out that in the Moskowitz case the Barlow challenge was never presented to the New York Court of Appeals for the simple reason that the Barlow decision had not yet been handed down by this Court at the time the Moskowitz case was decided by the New York State Court of Appeals. Therefore, since the New York State Court of Appeals could not possibly have applied the Barlow case in its Moskowitz decision, the Moskowitz case has no bearing whatsoever on the Barlow challenge subsequently made by the appellant before the New York State Court of Appeals and before this Court.

We respectfully submit that the avoidance of the merits and the erroneous reliance on Moskowitz are fatal confessions of weakness, and very clearly warrant full briefing and argument before this Court (if not a reversal on the strength of the jurisdictional statement).

As the appellant has asserted in his jurisdictional statement, and now wishes to re-assert in the light of the appellee's response, if the Court opens this Fourth Amendment question to full briefing and oral argument, appellant fully expects to convince a unanimous Court that the challenged

statute is unconstitutional on the strength of the Barlow case alone, for the reasons summarized in the jurisdictional statement (on pages 16 and 17).

Appellant also wishes to call the attention of the Court to a highly significant misstatement by the appellee regarding the scope of the appellant's constitutional challenge that goes directly to the heart of the constitutional question.

In the very first sentence of appellee's POINT II (page 9), he creates the incorrect impression that the appellant is challenging two statutes, namely, Section 63(8) of the New York Executive Law and Section 2305(c) of the New York Civil Practice Law and Rules, when this is clearly not the case.

In the jurisdictional statement (page 5) appellant clearly indicated only one statute being challenged, which is the New York subpoena statute, namely, Section 2305(c) of the New York Civil Practice Law and Rules (CPLR 2305(c)), and identified that statute with the major heading:

"STATUTE CHALLENGED AS UNCONSTITUTIONAL"

Since CPLR 2305(c) is a subpoena statute that applies to all agencies of the State of New York, appellant also set forth the Executive Law Section 63(8) as a relevant statute to show how the particular State agency of the appellee (the State attorney-general) was empowered, to use the subpoena statute (and also to show that refusal to turn over supoenaed documents to the attorney-general was a crime (misdemeanor), which portion the appellee omitted from his excerpt of the statute). Appellant also identified the Executive Law excerpt (on page 6) with the major heading:

"RELEVANT COMPANION STATUTE"

Appellant is not challenging in any way the constitutionality of the Executive Law or any of the other State statutes that authorize all other State agencies to issue subpoenas under CPLR 2305(c).

Our focus is strictly on the subpoena statute, CPLR 2305(c). The basic constitutional objection here is that all agencies of the State of New York can now use CPLR 2305(c) to seize possession of documents with no limitation or qualification on the face of the statute regarding the seizure itself. The only limitations on the face of the statute concern conditions of possession after seizure (which the appellee admits in his discussion of the Fourteenth Amendment, page 10, lines 9 thru 15 of the motion to dismiss).

There are no limitations in the statute regarding "search" warrants or "inspection" warrants; there are no limitations here regarding seizure of only so-called "required records"; there are no limitations here regarding the "civil" or "criminal" purpose of the seizure; there are no limitations here regarding "special purpose" legislation for some particular or traditional public benefit. The statute has no substantive or procedural limitations of any kind on the seizure itself.

This statute, by giving every agency in the State of New York a "blank check" to seize documents, is a "seize first and answer questions later" type of command from the State legislature that has more far-reaching consequences, in appellant's opinion, than the consequences of the General Warrants and Writs of Assistance against which the Fourth Amendment was designed to protect us.

POINT II

REPLY TO THE RESPONSE OF APPELLEE TO THE FIFTH AMENDMENT QUESTION

In his jurisdictional statement (page 4) the appellant raised the following Fifth Amendment question:

Fifth Amendment question:

> The Fourth Amendment question aside, does a State statute that authorizes warrantless seizures by any State agency authorized to issue subpoenas violate, on its face, the self-incrimination and due process protections of the Fifth Amendment on the grounds that the statute requires compulsive authentication and surrender of all subpoenaed documents and fails to provide a subpoenaed party who is an individual or a sole proprietor the opportunity to assert, if he wishes, under due process testimonial conditions, his Fifth Amendment privilege (regarding testimony, property, or books and records), and which compulsion is compounded by a companion statute that makes it a crime (misdemeanor) for a subpoenaed party to refuse to testify or to surrender possession of subpoenaed books and records.

The essence of the appelle's response to this question is stated at the end of his discussion of the Fifth Amendment challenge (page 11 of the motion to dismiss):

> "Therefore, under the "required records" doctrine which this Court recognized in Shapiro v. United States, 335 U.S. 1, 17-19 (1948), Fahey lacks a viable Fifth Amendment interest in the subpoenaed records."

We sharply disagree on the simple ground that the challenged New York statute bears absolutely no resemblance, in the "required records" sense, to the statute upheld in the Shapiro case, and therefore the Shapiro case does not support in any way the constitutionality of the challenged statute.

We submit instead that the Shapiro case fully supports the position of appellant. For the purpose of this appeal, appellant fully accepts the holding of the Shapiro case.

The statute involved in Shapiro was a statute designed for a limited legislative purpose, namely, price control. No one challenged the constitutionality of the legislative purpose of the Act (the Emergency Price Control Act).

The provisions for "required records" were included in this statute as a means of regulating and enforcing the limited legislative purpose of the price control statute.

The right to issue subpoenas to obtain the "required records" needed to enforce the statute was given to the single agency created to enforce the statute (the OPA: Office of Price Administration).

Thus, in the Shapiro case the Congress legislated "required records" to enforce a particular statute with a limited legislative purpose, and specifically empowered a single Agency to issue subpoenas to obtain the "required records".

Congress would never dare, appellant submits, to pass a "General Document Seizure" statute which made no distinctions between "required records" and other records, and no distinction

between records that belonged to individuals or corporations, but merely authorized all the agencies of the Federal government to take possession of (seize) any documents they chose to list on any non-judicial subpoena they issued to any party they decided to serve with the subpoena.

That such a statute would clearly violate the Fifth Amendment, both with respect to compulsory self-incrimination and with respect to due process is self-evident.

And yet, this is exactly what the New York State legislature has done in passing CPLR 2305(c).

The statute gives all the agencies of the State a "general warrant" to seize any documents they chose to list on a non-judicial subpoena and to seize the listed documents from the party they serve. The statute contains no provisions regarding "required records" or other types of records; no provisions regarding documents owned by individuals vs. those owned by corporations; and no provision restricting the use of the "seizure" subpoena to a limited legislative purpose as in the Shapiro case.

It is really an outrageous statute, which should be struck down on Fifth Amendment grounds alone.

In the instant case, because of a lack of due process provisions in the statute, the appellant had no opportunity to ever assert under testimonial conditions (if he wished to do so) his Fifth Amendment privilege.

The record of the Special Term proceedings will show that the Court not only denied appellant's request for an evidentiary hearing, but also denied

a request to file a reply to an answer served by the appellee on the very morning of the hearing.

This statute does not even contain the semblance of an opportunity to assert any Fifth Amendment protection.

Without a normal exchange of papers between the parties, and without an evidentiary hearing, there is also no opportunity to make a record hearing on Fifth Amendment matters, which would include such significant matters as determining what is a "required record" (appellee's answer at Special Term contained no allegation of obtaining any "required records"), proving allegations of harassment made by the appellant, and refuting allegations made in appellee's answer, to which appellant was not even permitted to reply.

> ———In this connection it should be noted that in the instant case, because of the absence of an evidentiary hearing, there has been no judicial finding in the record that any of the subpoenaed documents are so-called "required records".

Although the points discussed in the preceding paragraph are basically Fourth Amendment matters they have been mentioned here because the challenged statute is so devoid of Fourth Amendment requirements that the absence of those requirements maximizes the absence of Fifth Amendment protections.

POINT III

REPLY TO THE RESPONSE OF APPELLEE TO THE FOURTEENTH AMENDMENT QUESTION

In his jurisdictional statement (page 4) the appellant raised the following Fourteenth Amendment question:

Fourteenth Amendment question:

> The Fourth and Fifth Amendment questions aside, does a State statute that authorizes warrantless seizures by any State agency authorized to issue subpoenas violate, on its face, the Fourteenth Amendment protection against the taking of property without due process, on the ground that the statute does not require the State, prior to the taking of property, to satisfy all the fundamentals of due process (notice, evidentiary hearing, and judicial sanction).

The essence of appellee's response to this question is that:

> (1) the subpoena itself satisfies the notice requirement of due process by informing the subpoenaed party when and where the seizure will take place, and
>
> (2) the subpoenaed party can obtain judicial participation after the seizure to affect the terms and conditions of the period of possession.

Appellant submits that these responses do not satisfy the due process requirements of the Fourteenth Amendment.

Appellant submits that "notice" means notice of a due process hearing, whether it is before a court or an administrative hearing conducted with all of the elements of an adverserial proceeding.

Appellant contends that an "evidentiary hearing" is an essential part of any proceeding involving the taking of property. This element is absent from this challenged statute.

Appellant contends that "judicial sanction" pertains to obtaining judicial approval for the taking of property before the property is actually taken, and not after it is taken.

Under the challenged statute a subpoena could require a subpoenaed party to turn over documents "on demand" or "immediately". In such a circumstance the subpoenaed party has the choice of:

> (1) refusing to turn over his documents, thereby violating one of the penalty provisions for not turning them over, or
>
> (2) turning the documents over, thereby losing his constitutional protections.

Appellant submits that this kind of choice hardly satisfies the due process requirements of the Fourteenth Amendment.

With respect to the instant case, the due process deficiencies have already been discussed with respect to the denial of a request for an evidentiary hearing and the denial of a request to file reply papers.

One highly significant additional point with respect to "notice" is submitted for the consideration of the Court.

If there had been a "notice" provision in the challenged statute, the appellee would never have been able to obtain an ex-parte Order from Special Term transferring custody of the subpoenaed documents from the Onondaga County Court Clerk to the appellee while the case was on appeal to this Court.

This incident, appellant submits, dramatically illustrates the absence of Fourteenth Amendment protections in the challenged statute.

POINT IV

RESPONSE TO THE MOOTNESS QUESTION RAISED BY THE APPELLEE

The appellee has improperly caused the transfer of the subpoenaed papers from the custody of the Onondaga County Court Clerk to himself.

Appellee improperly achieved this transfer while the case was on appeal to this Court by obtaining from a Special Term Justice an ex parte Order containing the erroneous statement that there was no appeal pending in this case and ordering the documents to be transferred to the appellee, which Order was filed with the Court Clerk on April 30, 1979.

The Order of the Special Term Judge is included herein at page A1 of the Appendix. The body of the Order contains no date, and also contains no identification of the Court from which it was issued.

Moreover, this action was taken by appellee in the face of a stay order issued by the Appellate Division (Fourth Department) of the Supreme Court of the State of New York on April 14, 1978, which stay is on file with the Onondaga County Clerk, and which stay has never been vacated.

It hardly needs saying that the appellee should not be allowed to profit from this wrong-doing.

The wrong-doing aside, the appellee has no basis for arguing mootness.

The possession of the documents by the appellee does not lessen the controversy, but rather intensifies it.

The only case cited by the appellee to support his position stands for a proposition that is exactly opposite to the position taken by appellee, namely, Defunis v. Odegaard, 416 U.S. 312 (1974).

Defunis stands for the proposition that a case is moot if the appellant has achieved his relief, or is about to achieve it, at the time the case is decided by the Supreme Court.

The only way appellant will achieve his relief in this case is to receive a favorable decision from this Court, which will result in the return of his subpoenaed documents.

Appellant respectfully submits that the wrongful transfer of the documents by the appellee does not provide any basis for mootness in this case.

Furthermore, the record at Special Term will show that the appellee has already indicated that he intends to examine the books of the nursing home not only for the years stated in the subpoena (1971 thru 1975) but also for subsequent years.

This means that the appellant can reasonably expect to be exposed to additional subpoenas for those subsequent years.

This fact which, we repeat, is in the record (Tr. 28) should, we submit, be dispositive of the mootness question that was caused by the appellee to deprive the appellant of his strong and valid constitutional claims before this Court.

Appellant respectfully observes that perhaps a strong fear of losing the case motivated appellee to such conduct.

In any event, appellee submits that this mootness "incident" points up very dramatically one of the due process weaknesses in the challenged statute which allowed this incident to occur because of the absence of any requirement of "notice" in the statute, which permitted the granting of the ex parte Order to transfer the documents.

This due process weakness, together with all the other constitutional deficiencies appellant has put forth to this Court warrant, we respectfully submit, a full briefing and oral argument in this case.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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June 4, 1979

APPENDIX

ORDER OF JAMES P. O'DONNELL, J.S.C.
(undated) (filed April 30, 1979).

PRESENT:

HONORABLE JAMES P. O'DONNELL

In the Matter of the Application of

THOMAS M. FAHEY, d/b/a
Castle Rest Nursing Home,

Petitioner,

— against —

ORDER
Index No. 78-585

CHARLES J. HYNES, Deputy Attorney General of the State of New York (Special Prosecutor),

Respondent,

For an Order Pursuant to Articles 5, 23, and 78 of the Civil Practice Law and Rules.

UPON THE APPLICATION OF Paula M. Ryan, Esq., and upon all papers and proceedings had prior hereto,

IT APPEARING that the Order of this Court dated February 14, 1978, enforcing Respondent's executive subpoena duces tecum, has been affirmed at all appellate levels and no appeal or application for permission to appeal is currently pending in the instant matter; and it further appearing that the books and records subject to said subpoena duces tecum are in the custody of the Clerk of the County of Onondaga pursuant to the Order of the Honorable Hugh R. Jones dated February 22, 1978, and it further appearing that there are no remaining legal or equitable bars to the execution of this Court's order of February 14, 1978, it is

ORDER OF JAMES P. O'DONNELL, J.S.C.
(undated) (filed April 30, 1979).

ORDERED, that said Clerk prepare a written inventory of the materials deposited with him in the course of this litigation, including the contents of any boxes; said inventory is to be conducted in the presence of Respondent's representatives, and further

ORDERED, that the Clerk surrender custody of said materials to Respondent's representatives, with a copy of the written inventory, on or before May 7th, 1979.

Dated: Syracuse, New York

ENTER

s/ JAMES P. O'DONNELL
JAMES P. O'DONNELL
J.S.C.

APR 30 11 54 AM '79
ONON. CO. CLERKS OFFICE
s/ JAMES D. GORMAN
Clerk

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